United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7434

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P/S

United States Court of Appeals

For the Second Circuit

Docket No. 76-7434

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs-Appellants,

—against—

LOUIS NIZER, DOUBLEDAY & CO., INC. and FAWCETT PUBLICATIONS, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

APPELLANTS' REPLY BRIEF

MARSHALL PERLIN
36 West 44th Street
New York, New York 10036
(212) 661-1886

SAMUEL GRUBER
218 Bedford Street
Stamford, Connecticut
(203) 323-7789

MAX R. MILLMAN
1420 Walnut Street
Philadelphia, Pennsylvania 19102
(215) KI 6-5950

Attorneys for Plaintiffs-Appellants

KRISTIN BOOTH GLEN
MARSHALL PERLIN
Of Counsel

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The False and Defamatory Statement

The defendants' brief (p. 14-15) suggests that the plaintiffs do not dispute the lower court opinion that the writings about the plaintiffs were not false and did not constitute a libel. They maintain that plaintiffs did not specify any of the false and defamatory statements. Defendants are clearly in error. They choose to ignore plaintiffs' answers to interrogatories (836-853) (see also affidavit of March 1, 1974, (152-168)) wherein the plaintiffs specify the false and fictitious statements and portions of the book upon which the second count is based.

There are actually two segments of The Implosion Conspiracy. One purports to describe what happened in the court proceedings, while the other is focused upon the plaintiffs, their parents Julius and Ethel Rosenberg, and their parents' attorney, Emanuel Bloch. This latter portion constitutes approximately thirty percent of the book. It is in the latter area where one finds most of the defamatory statements, casting plaintiffs in a false light. While we have previously cited numerous portions of the record where the false statements are to be found, for the convenience of the court we set forth some examples:

> (a) Both Robert and Michael are described as having always been difficult, neurotic children who lived an unwholesome life with their parents, deprived of the love that one would find in homes of even the underprivileged. This resulted from their parents' preoccupation with communist activity and ideology. (N. 23, 242, 367)*
>
> (b) Plaintiffs' mother is said to have had only secondary interest in her children and subordinated them to her political interests and her relationship with her husband. The Rosenbergs were perfectly willing to sacrifice their children for various nefarious purposes. (N. 367, 369-370, 399-400).
>
> (c) The plaintiffs' parents while in Sing Sing reluctantly permitted the children to visit in the summer of 1951. The defendants give a false and fictitious description of the visit, attributing fictitious statements and behavior to the plaintiffs. (N. 400-402). A later visit is similarly fictionalized. (N. 415).

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* On page 17 of defendants' brief, reference is made to an interview given by Michael to Ramparts Magazine wherein

(continued on following page)

(d) On pages 422-423 the defendants, after quoting certain of the copyrighted letters and concluding that the Rosenbergs were elated about their triumphant march to martyrdom, defendants state that the Rosenbergs "assigned" the plaintiffs to engage in public activity; the plaintiffs were "mustered" into the ranks. The defendants then write that the plaintiffs "were cast into the limelight . . . as sympathetic exhibits." They listened to speakers about their prospective orphanage and "heard the gruesome references to death in the electric chair."

(e) The last visit of plaintiffs with their parents just prior to the execution is once again portrayed falsely, and fictionalized behavior and statements are attributed to plaintiffs. (N. 433-436).

(f) On page 483 of the Nizer book, the defendants falsely and fictitiously describe Michael's behavior in hearing about the execution of his parents, stating that he fell into a fetal position and lay whimpering.

(g) In the last two pages of the book (N. 491-92), the defendants seek to impart to the reader that the plaintiffs, alienated from their parents and rejecting their parents' life, and rid of their evil influence, grew up to be "normal decent citizens."

Each and every one of these false and fictitious statements defamed the plaintiffs and falsely portrayed their attitudes and relationships with their natural parents. These

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he described the emotional turmoil resulting from his parents' incarceration under sentence of death. The defendants erroneously seek to import that this condition preceded plaintiffs' parents arrest.

false statements would cause plaintiffs to suffer embarrassment, ridicule and humiliation and cause the most profound anguish and personal suffering.

These false writings do "outrage public tolerance"; they are "repugnant to one's sense of decency." These writings do not "concern matters properly within the orbit of public interest and scrutiny." It is hard to conceive how a "serious scholarly analytic study" of the Rosenberg-Sobell case warranted the injection of these false and fictitious writings about plaintiffs' personal, intimate family life and feelings. Such writings on their face would cause personal humiliation, mental anguish and suffering as well as injure one's reputation. See Gertz v. Welch, 418 U.S. 323 (1974).

Falsely holding out the plaintiffs as pawns of their parents, deprived of any normal love, affection and family life, who were compelled to reject and disassociate themselves from their parents, makes plaintiffs "an object of pity," and "tends to make him be shunned or avoided." The New York Court of Appeals has held such writings to be libel per se, bound to evoke feelings of pity, embarrassment and ridicule. Katapodis v. Long Island Spectator, Inc., 287 N.Y. 17.

Were The Plaintiffs "Public Figures" At The Time Of Publication

The lower court granted the motion for summary judgment dismissing the second count on the premise the plaintiffs were "public figures". The issue is whether the plaintiffs were public figures at the time of publication of defendants book in February 1973. One must exclude from consideration plaintiffs subsequent acts arising from the institution of this action which exposed plaintiffs to the public for the first time in twenty years. See Gertz v. Welch, supra; Time v. Firestone, 424 U.S. 448 (1976). The plaintiffs did not chose to become the subject of the defendant's book.

As the record (152-158) makes clear, from the time of the Rosenbergs arrest, affirmative steps were taken to immunize them from public scrutiny and attention. After the execution, the plaintiffs remained totally removed from any public involvement in their parents case. This isolation was continued when the plaintiffs reached adulthood and until May 1973. Their relationship to the Rosenbergs were kept secret from their closest friends and associates.

How in the face of these undisputable facts the lower court could find as a matter of law that the plaintiffs were

"public figures" at the time of the book's publication is totally inexplicable. In any event, that issue could only be determined by an evidentiary hearing before the trier of the facts, court or jury. See Gertz v. Welch, supra.

Discovery - Actual Malice

The defendants' do not dispute the fact that plaintiffs were permitted no discovery whatsoever on the second count of the complaint. At the very onset in September 1973, the plaintiffs were precluded by order of the lower court from discovery as to the second count.

Assuming, arguendo, that plaintiffs were "public figures" and they were required to show "actual malice", it was clearly erroneous for the lower court to grant the motion for summary judgment without affording plaintiffs discovery. The question of the defendants' intent, their knowledge of the falsity of their writings, their reckless disregard of the truth required the deposition of the author and the publishers. Notwithstanding, the lower court chose to arbitrarily and capriciously deny plaintiffs discovery on these crucial issues. The lower court then compounded the error by making exparte findings of fact that plaintiffs could not possibly prove the falsity of defendants writings or "actual malice on the part of the defendant." The decision of the lower court granting the motion for summary judgment must be vacated for this reason alone.

The Lower Court's Denial Of Due Process In Granting The Motion To Dismiss Count II

The defendants on pages 18 and 19 of their brief seek to justify the lower court's refusal to permit discovery and to grant the motion for summary judgment on the statements contained in footnote 4 of Judge Tyler's opinion, and on that basis they dispute plaintiffs' statements on pages 19-20 of plaintiffs brief. Whether the misdescription of the proceedings below by the lower court was a result of inadvertence, or faulty memory or otherwise need not be determined. What is clear is that the footnote does not comport with the facts, and the errors therein explains in part other erroneous conclusions in the lower court's opinion. It is the docket entries and the actual documents of record and the memoranda submitted which establishes the facts.

The defendants served their motion on January 30, 1974. The plaintiffs, by letters dated February 19 and February 25, 1975, requested the lower court to defer consideration of the motion until the plaintiffs were permitted to proceed with the necessary discovery (152-53, 159-168). The lower court suggested the plaintiffs advise by affidavit on March 1, 1974 as to those matters plaintiffs wished to engage in discovery. (152-158)

On March 1, 1974 the parties appeared before the lower court and argued the motion to defer the matter until discovery was permitted to proceed. At the conclusion of the argument,

the court advised that it would take under consideration plaintiff's application and advise the parties thereafter. It requested that a memorandum of law be considered on the propriety of deferring consideration of the motion and allowing discovery in light of specified legal issues, and not the facts or the merits of defendants motion for summary judgment.

On March 18, 1974, within the time provided by the lower court, the plaintiffs submitted a memorandum which bore the following title:

> "MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A DEFERRAL OF THE CONSIDERATION OF THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT UNTIL THE COMPLETION OF DISCOVERY RELATING THERETO."

In that memorandum the plaintiffs' restated the posture of the proceedings:

> "This Court directed that plaintiffs' counsel submit points and authorities directed to certain of the issues raised. It is in this context that this memorandum is submitted, reserving to the plaintiffs the right to submit opposing affidavits as well as a memorandum of law after this Court's intermediate ruling as to whether plaintiffs will be afforded the opportunity to proceed with the necessary discovery relating to Count II of the complaint. Thus the plaintiffs are not submitting any affidavits in opposition to the motion at this time, nor are plaintiffs submitting a statement pursuant to General Rule 9(g) of this Court. Similarly, we do not deal with the factual issues which were raised in the affidavits of Messrs. McCormick and Nizer submitted in support of the motion." (emphasis supplied)

In April of 1974 the lower court asked that the plaintiffs, without prejudice to the application for discovery and deferment of the summary judgment motion, submit a Rule 9(g) statement. Within the requisite time plaintiffs submitted Plaintiffs' Response to Request For A Statement Under Rule 9(g) (169-180). In the brief in chief the pendency of the plaintiffs' motion to defer and engage in discovery was referred to (169-180) (pp. 19-20).

The lower court thereafter never ruled on plaintiffs' application, save for the filing of the opinion and order of July 31, 1974. No affidavits in opposition to the motion for summary judgment was ever submitted by plaintiffs or their attorneys.

No "brief in opposition to the motion was filed on March 18, 1974." No affidavit was submitted with "plaintiffs' brief in opposition" [MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A DEFERRAL, etc.].

An examination of the record and the docket entries establishes the parties appeared on numerous occasions before Judge Tyler in April through July, 1974. Motions directed to the production of documents relating to Count I, and plaintiffs' demand for a jury trial were heard. In May and June, 1974, the parties were involved in the litigation regarding the stay

of the Connecticut action. Opinions were written by the lower court in June and early July, 1974. At no time were plaintiffs ever advised that their motion for deferral and discovery had been rejected, or that they had failed to file affidavits required or requested by the court.

When the lower court stated in its opinion that it was "clear from the records, consisting of extensive interrogatories, depositions and affidavits, that plaintiffs cannot show that the book was published with actual malice" (193-194), the lower court based that conclusion on an erroneous premise. No answers to interrogatories or depositions were ever granted to plaintiffs on Count II. That had been foreclosed by the lower court. There was no basis for the court finding that plaintiffs could not prove falsity and actual malice.

The Defendants' Use Of The Copyrighted Letters

Judge Tyler in his opinion states that the plaintiffs' copyrighted letters were used "to illustrate from an historical and legal point of view the post-conviction appeals and petitions..." and that "resort to quotations of certain of the Rosenberg letters is important to any serious book on the trial..." (106-107)

Similarly, Judge Gagliardi states that "it appears that the purpose of using the letters is to

illustrate historical facts with which the work deals rather than to capitalize on the unique intellectual product of the persons who wrote them"; that "excerpts from the letters" were "like the trial transcripts and other source materials". (679)

In like manner, the defendants argued on page 6 of their brief that quoting verbatim from the letters was essential "to present the post-conviction period in historical perspective."

Examination of the copyrighted letters set forth in the defendants' book reveals that both the lower court judges and the defendants are equally wrong. All of the letters quoted verbatim are expressions of mutual love and affection; discussions about the plaintiffs; expressions of loneliness and discussion of intimate family affairs. Two letters express disappointment and disillusionment in learning of the affirmance of their conviction by the Court of Appeals, and one is an expression of anger at the comments made by the sentencing judge.

These letters are not "historical facts" essential to be quoted verbatim in the defendants' book. There was absolutely no warrant for the misappropriation of plaintiffs' property. They were not essential for the analysis of the trial and post-trial proceedings. The substance could have been extracted without exact appropriation of the literary content and form.

The position reiterated by the lower court and the defendants have their internal illogic. On the one hand, they argue that the letters were essential to this book, while on the other hand they conclude that the letters were an insignificant portion of the book, not entitled therefore to copyright protection. Both findings were unwarranted and surely could not be determined without an evidentiary hearing. There was no more warrant for such findings of fact than there was the lower court's holding, as a matter of law, that since Louis Nizer "has a reputation as a leading trial lawyer,""this court believes as a matter of law a purportedly serious work by one with Nizer's reputation and experience as a trial lawyer...is of some public benefit and thus a historical work entitled to claim the protection of the fair use doctrine". (666)

As plaintiffs have established in their papers in opposition, the defendants appropriated the letters which were used "to capitalize on the unique intellectual product" of plaintiffs' property and to exploit them for defendants commercial gain. These letters were used not only to attempt to authenticate the book, notwithstanding its fraudulent nature, but also to give this shoddy work "public appeal" and by these means exploit the public interest in the Rosenberg case. The defendants' dust jacket, radio, press and television ads offer convincing

proof as do the writings and speeches of Nizer (see brief in chief).

Fantasy and Fact - The Trial

On page 13 of the defendants' brief they contend, notwithstanding the lower court's grant of summary judgment, "that at least with respect to the copyright claims, this is not only an appeal from a grant of summary judgment, but also an appeal from a decision rendered after a trial on the issue of fair use."

If the defendants are not fantasizing, their contention that there was a trial is false as they well know. It is an insult both to the plaintiffs and to this Court to even tender such an argument. Plaintiffs submitted in April 1975 affidavits and exhibits totalling 410 pages, 56 of which were tendered after argument in March 1976. Judge Gagliardi was assigned the case in May 1975. Although argument was requested, none was had until March 1976, after which affidavits and memoranda were submitted. To suggest the brief argument held on March 23, 1976, at 5:00 P.M., constituted a trial of this action demonstrates to what ends the defendants will go to avoid an actual trial, and their utter lack of honesty and good faith.

The Issue Before The Court

On pages 21-25 of the defendants brief, they engage in a diatribe against the plaintiffs making false and malicious statements, and seek to obscure the actual issues that are before this Court.

The defendants' main pre-occupation is to avoid at all costs a trial-to avoid placing the defendants on the witness stand, and in having a true airing of the relevant facts. Defendants well know that their defense, when fully exposed, will be shown to be without merit.

The true objective of the defendants, which explains their tactics throughout this case is revealed on page 21 of the brief wherein they state

> "...quite apart from considerations involving either the merits of this action or the First Amendment, this action should be finally brought to a halt." (p. 21)

That has been their position since this case was initiated in June of 1973. It is for this reason that they have engaged in stalling tactics and have used every maneuver to avoid discovery by plaintiffs and have refused to produce documents within their possession which would expose the facts they wish to hide. The defendants on page 23 of the brief refer to the multitude of motions that came before the court. They choose not to mention the fact that almost everyonne of those motions were brought on by them to play their procedural games and thus to delay or avoid a trial.

In the papers filed when this action was instituted, in an affidavit by the plaintiffs, sworn to on June 18, 1973, the plaintiffs stated categorically

> "We understand the question of our parents innocence is not to be litigated in this proceeding."

The plaintiffs are now engaged in litigation in Washington, D.C., seeking to release all of the documents pertaining to the Rosenberg-Sobell case in the custody of the government. These documents number into the hundreds of thousands. These documents, when released, the plaintiffs are sure, will establish the innocence of the plaintiffs.

The plaintiffs have not chosen the present action or the present forum in which to litigate their parents' innocence. It is not an issue in this action or appeal, whatever others may subjectively feel.

The ultimate determination of the forum or the action if any, legislature, judicial or otherwise, to establish innocence is not before this Court or involved in this appeal.

The defendants will resort to any tricks and deceptions, will inject red herrings in attempting to prejudice the courts. We cannot deny that they have been successful to some extent in the court below.

It was to avoid the danger of prejudice and bias that the plaintiffs had moved to transfer this appeal to another forum. We have been unsuccessful. We wish and hope to get a fair hearing on the present appeal, notwithstanding our very legitimate concern and valid reasons for seeking another forum.

In these circumstances it is particularly important that this Court strike from its consideration the false, improper and misleading statements contained in the defendant's brief, and to this end seek to afford the appellants a fair hearing on the true issues in this litigation.

Dated: New York, New York
March 17, 1977

Respectfully submitted,

MARSHALL PERLIN
SAMUEL GRUBER
MAX R. MILLMAN

Attorneys for Plaintiffs-Appellants

Of Counsel:

Kristin Booth Glen
Marshall Perlin

MICHAEL MEEROPOL [illegible]

C-275—Affidavit of Personal Service of Papers on Individual.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

UNITED STATES COURT OF APPEALS
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Appellants,

against

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Defendants-
Appellees.

Docket No. 76-7434

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

Spencer Maher being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 19 Stuyvesant Oval, New York, N.Y. 10009

That on the 17th day of March 19 77 at 227 Park Avenue New York, N.Y.

deponent served the annexed APPELLANTS' REPLY BRIEF upon

Satterlee & Stephens, attorneys for Defendants-Appellees Doubleday & Co., Inc. and Fawcett Publications, Inc.

in this action by delivering 2 true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorneys for Defendants-Appellees Doubleday & Co.,Inc. and Fawcett Publications, Inc.

Sworn to before me, this 17th day of March 19 77.

GEORGE COHEN
Notary Public, State of New
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1977

Spencer Maher
Print name beneath signature
SPENCER MAHER

C 375 -- Affidavit of Personal Service of Papers on Individual.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

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Phillips, Nizer, Benjamin, Krim & Ballon, attorneys for Defendant-Appellee Louis Nizer

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